A Human Rights Approach to Corporate Accountability and Environmental Litigation

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Introduction

THE RIGHT TO A HEALTHY environment is a developing legal standard that is currently implemented in regional human rights conventions and national constitutions.[1] This Comment will discuss how recognizing the environment as a human right will change the adjudication of environmental cases, mechanisms, and remedies available for environmental rights claims. Due to the inadequacy of international environmental law in providing a means for individuals to file a claim against polluters for damages and injunctive relief, a rights-based approach provides a mechanism for victims of environmental disasters to enforce state environmental obligations and hold multinational corporations liable for environmental harm. Using the case between Bhopal and Union Carbide as an example, this Comment explores how a human rights approach would provide a more efficient means of achieving compensation and deterring environmental law violations.

I. Espousing Environmental Viability as a Human Right

Environmental law seeks to protect natural resources and ecology yet provides little means of redress for the individual.[2] When a state jurisdiction proves inadequate to resolve the harm caused to a victim of environmental abuse, there is little redress available for the victim.[3]

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1. *See* DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1378 (3d ed. 2007).

2. *See id.* at 1367.

3. *Id.* at 1425, 1429.

Furthermore, international law proves inadequate because environmental matters are governed by treaties in which states are parties. Thus only states, and not individuals, can bring claims when there is a problem of transboundary harm. A human rights approach will shift matters of environmental harm from a state concern to the realm of the individual, thus providing access to the many regional and international human rights bodies for individual environmental claims when state law is insufficient.

A. Human Rights Approach

Human rights law protects individuals from abuse by state actors and ensures that states take measures to prevent human rights violations by non-state actors.[4] The human rights system, unlike international environmental law, already has mechanisms to ensure individuals and non-governmental organizations ("NGOs") may bring claims for violations of human rights.[5] Such parties may bring their claims before an independent commission that in turn investigates state compliance with human rights norms.[6] Connecting human rights and environmental harm "allows global and regional human rights complaint procedures to be invoked against those States that violate human rights through poor environmental protection."[7] Victims of environmental harm can, through widely established human rights tribunals, challenge government action or inaction and therefore increase arbitration available for individuals under international environmental law.[8]

Recognizing a right as a human right invokes strong moral sensibilities and emphasizes the inalienable nature of this right. Human rights law underscores the importance of the issue and establishes a non-derogation principle of that right. Recognition of environmental rights as fundamental can stimulate political activism and involvement in environmental protection. Author and environmental rights activist Michael R. Anderson notes that "[c]oncerned citizens and NGOs are more likely to rally around a general statement of right than a highly technical bureaucratic regulation expressed in legalese."[9] A right is a

4. DINAH SHELTON, THE ENVIRONMENTAL JURISPRUDENCE OF INTERNATIONAL HUMAN RIGHTS TRIBUNALS 1 (Romina Picolotti & Jorge Daniel Taillant eds., 2003).

5. *See* HUNTER ET AL., supra note 1, at 1367.

6. *Id.* at 1367, 1397.

7. SHELTON, *supra* note 4, at 1.

8. *Id.* at 2.

9. Michael R. Anderson, Human Rights Approaches to Environmental Protection: An Overview, *in* HUNTER ET AL., *supra* note 1, at 1368.

clear protection that provides a moral incentive to foster environmental concern, whereas a regulatory law—which is inundated with legal and scientific terminology—is more impersonal and may not induce the same level of activism.

Furthermore, current environmental protection instruments operate under a system of incentives and treaties. The Kyoto Protocol, with its objective to reduce harmful carbon emissions, created an elaborate cap and trade system that has proven ineffective.[10] However, human rights treaties are not incentive based but are instead enforced by holding states liable.[11] Thus, human rights law provides a means for hearing individual as well as state complaints and shifts the focus of environmental law as a purely state concern to a concern of the state and the individual.

B. Objections to a Human Rights Approach

Despite the potential benefits of adopting the right to a healthy environment as a human right, critics argue that such a shift presents several problems. First, they argue that recognizing a human right to a healthy environment would diminish the value of other human rights. Second, they argue that the language proposed for such a right (i.e., "healthy environment") is equivocal and therefore unenforceable. Critics also claim that modern rights, such as the right to a healthy environment, are part of social policy objectives and lack a legal basis. These criticisms illustrate the difficulty some face in conceptualizing the foundational nature of the environmental right.

Critics first argue that in effectuating new human rights claims, such as the right to a healthy environment, there is a possibility of diminishing the value of previously established human rights.[12] That is, extending the scope of human rights may effectively weaken human rights claims generally and detract from their fundamental nature.[13] The criteria for establishing human rights should remain rigorous and new rights should be implemented only if they "have a clearly defined object and an identifiable subject and can be reasonably ex-

10. Dinah Shelton, *Human Rights, Environmental Rights and the Right to Environment*, 28 STAN. J. INT'L L. 103, 134 (1991) ("[H]uman rights treaties rely upon state reporting procedures, inter-state complaints, and individual petitions or complaints, all of which directly or indirectly permit attack or criticism of non-complying states.").

11. *Id.*

12. Stephen P. Marks, *Emerging Human Rights; A New Generation for the 1980's*, 33 RUTGERS L. REV. 435, 451 (1981).

13. *Id.*

pected to be enforced."[14] Critics claim that modern rights, such as the right to a healthy environment, are social policy constructs and have no legal basis for enforcement.[15] Critics instead argue that such moral rights remain speculative, act only as an incentive to create new law, and do not have the same legal basis as rights established in human rights covenants.[16]

These critics fail to address the foundational nature of environmental viability. This Comment argues that other established human rights—such as the right to life, right to self determination, right to use and enjoyment of property—cannot be achieved without a viable environment to support the individual. In addition, many national constitutions and courts recognize a right to a healthy environment, thus giving legal color to environmental rights claims.[17]

Second, commentators argue that language such as "healthy environment" is equivocal and too vague to implement.[18] However, other language used in human rights covenants, such as the right to self determination,[19] often does not specify the meaning of the right. Rather, the United Nations ("UN") Human Rights Council determines the purview of the particular right. Similarly, standards of a healthy environment, although still general, can be determined through the qualifying language in various doctrines and national constitutions. The Stockholm Declaration, for example, holds that the quality of the environment "permits a life of dignity and well-being,"[20] and Article 45(1) of the Spanish constitution regards a healthy environment as one that is "suitable for the development of the person."[21] Thus, a general provision for a healthy environment may be established while the substantive requirements remain open for develop-

14. *Id.*

15. *See* A.H. ROBERTSON, HUMAN RIGHTS IN THE WORLD 296 (4th ed. 1996) ("[A]dvocates of 'new human rights' tend to confuse objectives of social policy with rights in the lawyers' sense. If one wishes to see some objective achieved—a clean and healthy environment, for example—it is tempting to say that this is a right to which we are all entitled. But it is not a good idea to take wishes for reality.").

16. *See id.*

17. *See* discussion *infra* Part I.C.

18. Marks, *supra* note 12, at 451.

19. Article 1 of the International Covenant on Civil and Political Rights holds: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." International Covenant on Civil and Political Rights, art. 1, Dec. 19, 1966, 999 U.N.T.S. 171.

20. United Nations Conference on Human Environment, June 3–14, 1972, *Stockholm Declaration*, ¶ 1, U.N. Doc. A/.CONF.48/14/Rev.1 (June 5–16, 1972).

21. CONSTITUCIÓN DE ESPANA [C.E.] [Constitution] art. 45(1).

ment and determination through tribunals and other bodies tasked with implementation of human rights. The content of the right may also respond to the needs of each region and "[t]he fact that the right to [a healthy] environment will be implemented in varying ways in response to different threats over time and place does not undermine the concept of the right, but merely takes into consideration its dynamic character."[22]

C. Approaches to Linking Environmental Protection and Human Rights

Notwithstanding criticism, lawyers and activists have advocated environmental rights as human rights through a variety of theories.[23] The right to a healthy environment is a prerequisite for other international human rights such as the rights to life and health, thereby requiring environmental protection as part of the protection of human rights. Similarly, it is arguable that these rights are part of the right to a healthy environment. In 2001, Klaus Toepfer expressed this notion in his statement to the 57th Session of the Commission on Human Rights:

> Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognize that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well.[24]

Thus, a healthy environment is a precondition for the protection of other inherent rights.

Human rights covenants that protect a right to health underscore the necessity of a healthy environment. The International Covenant on Economic, Social and Cultural Rights ("ICESCR") guarantees the right to safe and healthy working conditions.[25] Article 12 also provides a right to health which requires states to take action to improve "all aspects of environmental and industrial hygiene."[26] A child's right to

22. Shelton, *supra* note 10, at 136–7.

23. HUNTER ET AL., *supra* note 1, at 1373–82.

24. Klaus Toepfer is the Former Executive Director of the United Nations Environment Programme. His statement is quoted in Press Release, United Nations Environment Programme, Living in a Pollution-Free World a Basic Human Right (Apr. 27, 2001), *available at* http://www.unep.org/Documents.Multilingual/Default.Print.asp?documentid=197&articleid=2819&i=en.

25. International Covenant on Economic, Social and Cultural Rights, art. 7(b), Dec. 16, 1966, 993 U.N.T.S. 4.

26. *Id.* art. 12.

health, expounded in the Convention on the Rights of the Child, requires that state parties take appropriate measures to provide "adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution."[27]

The right to life requires the right to a health environment. The right to life is a non-derogable human right norm that is recognized, inter alia, in Article 3 of the Universal Declaration of Human Rights and Article 6(1) of the International Covenant on Civil and Political Rights ("ICCPR").[28] This fundamental right cannot be satisfied without clean water, clean air, food, and an environment healthy enough to support life. The right to life may be infringed by government complicity in environmental degradation that results in death.

Various adjudicative bodies affirm the link between environmental harm and the right to life. For example, the United Nations Human Rights Committee recognized this connection in *Port Hope Environmental Group v. Canada,* recognizing that environmental harm may also violate the right to life in Article 6(1) of the ICCPR.[29] In his opinion in the *Gabcikovo-Nagymaros Case,* Judge Weeramantry stated that

> [t]he protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. False [D]amage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.[30]

Actual death is not necessary to present a right to life claim in international law—one must only show that the environmental harm presents a grave risk to human life.[31] The Human Rights Committee ("Committee") in *Port Hope* acknowledged that the plaintiff was able to argue a right to life claim based on the threat to life created by toxic waste.[32]

Article 12 of the Universal Declaration on Human Rights, Article 8 of the European Convention on Human Rights, and American and

27. Convention on the Rights of the Child, art. 24, Nov. 20, 1989, 1577 U.N.T.S. 44.

28. Universal Declaration of Human Rights, G.A. Res 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights, *supra* note 19, art. 6(1).

29. Port Hope Envtl. Group v. Canada, Communication No. 67/1980, 2 Selected Decisions of the Human Rights Committee Under the Optional Protocol 22, UN Doc. CCPR/C/OP/2, UN Sales No. E.89.XIV.1 (1990) [hereinafter Port Hope Envtl. Group].

30. Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 92 (Sept. 25) (separate opinion of Vice-President Weeramantry).

31. Port Hope Envtl. Group, *supra* note 29, at 22.

32. *Id.*

African human rights instruments all identify a connection between the right to privacy and the right to a healthy environment.[33] In doing so, the Committee recognized the causal link between potential harm to human life and unhealthy environment. In *Lopez Ostra v. Spain*, the European Human Rights Court determined that environmental harm may violate the right to privacy.[34] In *Lopez*, the plaintiff's daughter became ill after inhaling toxic fumes emitted by a nearby leather curing plant in the Lorca municipality, which was violating environmental standards.[35] Many families were displaced as a result of the highly toxic pollutants and the Lopez family filed a suit against Spain for violation of their right to privacy created by Article 8 of the European Convention on Human Rights.[36] The court held that Lorca and Spanish authorities permitted the plant to be built and were therefore indirectly liable for the harm.[37] Furthermore, the court acknowledged the applicant's enjoyment of her right to privacy and family life and found that the environmental harm amounted to a breach of that right to privacy.[38]

Article 1 of the ICCPR establishes another link between human rights and the environment. Article 1 creates the right of self-determination and recognizes the necessity of this right for the realization of all other individual human rights.[39] Self-determination is described as the inalienable right of all people to freely "determine their political status and freely pursue their economic, social and cultural development."[40] The right also entails the right of people to freely "dispose of the natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based on the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."[41] Thus, environmental harm that interferes with the availability of resources and deprives persons of their means of subsistence can amount to a violation of the right to self-determination.

Finally, the right to one's culture has also been associated with environmental rights. Article 27 of the ICCPR holds that persons be-

33. Lopez Ostra v. Spain, 20 Eur. Ct. H.R. 277, 281 (1995).
34. *Id.* at 297.
35. *Id.* at 279–80.
36. *Id.* at 287.
37. *Id.* at 295–97.
38. *See* HUNTER ET AL., *supra* note 1, at 1382.
39. International Covenant on Civil and Political Rights, *supra* note 19, art. 1.
40. *Id.*
41. *Id.*

longing to an ethnic, religious, or linguistic minority "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[42] The Human Rights Committee considered whether a group's Article 27 rights could be violated by either public or private entities, such as the state or a corporation through environmental harm in *Chief Bernard Ominayak and Lubicon Lake Band v. Canada.*[43] The court held that the extensive oil and gas exploration was negatively affecting the minority group's way of life, and therefore, infringing upon the Lubicon Lake Band's right to culture.[44]

As a precondition to the protection of a variety of other rights, several courts and administrative committees have articulated the need for the right to a healthy environment. For example, such a right is necessary to achieve the right to life,[45] the right to privacy,[46] the right to self determination,[47] and the right to enjoy one's culture.[48] It seems that international courts and committees have already implicitly recognized the right to a healthy environment; thus, solidifying this right should be an inevitable conclusion.

D. Right to a Healthy Environment as an Independent, Substantive Human Right

Despite the myriad of benefits and justifications for establishing an environmental right as a human one, proponents face an uphill battle because of the contentious criteria for creating a new human right. In regard to the criteria of establishing human rights, Professor Richard Builder claimed that "[i]n practice, a claim is an international human right if the United Nations General Assembly says it is."[49] In response to the debate over new human rights, the General Assembly advised that emerging international instruments in the field of human rights should conform to the following guidelines:

> (a) Be consistent with the existing body of international human rights law;

42. *Id.* art. 27.

43. Communication No. 167/1984, Report of the Human Rights Comm., U.N. GAOR, 45th Sess., at 27, U.N. Doc. A/45/40 (1990).

44. *Id.*

45. Port Hope Envtl. Group, *supra* note 29, at 22.

46. Lopez Ostra v. Spain, 20 Eur. Ct. H.R. 277, 287 (1994).

47. International Covenant on Civil and Political Rights, *supra* note 19, art. 1.

48. Communication No. 167/1984, Report of the Human Rights Comm., *supra* note 43, at 27.

49. Richard Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 WIS. L. REV. 171, 173 (1969).

(b) Be of fundamental character and derive from the inherent dignity and worth of the human person;
(c) Be sufficiently precise to give rise to identifiable and practicable rights and obligations;
(d) Provide, where appropriate, realistic and effective implementation machinery, including reporting systems;
(e) Attract broad international support.[50]

The resolution also reaffirms the role of the Commission on Human Rights in developing international instruments in the field of human rights.[51] It appears unlikely that individuals can claim a substantive right to a healthy environment without a clear delineation and recognition of the right by the Commission on Human Rights.

E. Has This Right Reached the Level of Customary International Law?

Customary rule of law is established by demonstrating widespread state practice in conformance with the rule and demonstrating that such state action is conducted under a sense of legal obligation or opinio juris.[52] To establish state action that is consistent with the rule, the International Court of Justice has "required that practice be both extensive and virtually uniform and include those States that are particularly affected by the proposed norm."[53] The existence of opinio juris is established by demonstrating that the state conforms to the rule under a sense of legal obligation and not just a moral obligation.[54] Evidence of opinio juris may include: "diplomatic correspondence, government policy statements and press releases, opinions of official legal advisors . . . state legislation, international and national judicial decisions, legal briefs endorsed by the states, a pattern of treaties in the same form," and other forms of evidence.[55] If a customary norm is established, then the rule is binding on all nations except for those states which persistently object to the practice.[56]

50. Setting International Standards in the Field of Human Rights, G.A. Res. 41/120, ¶ 4, U.N. Doc. A/RES/41/120 (Feb. 18, 1987).

51. *Id.* ¶ 3.

52. HUNTER ET AL., *supra* note 1, at 315.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* Note that all parties are bound except those who persistently object to the practice: "A principle of customary law is not binding on a state that declares its dissent from the principle during its development." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. b (1987).

Several international instruments and judicial decisions recognize the right to a healthy environment as a customary norm.[57] This further illustrates the readiness of the international community to accept an explicit human right to a healthy environment.

1. International Recognition of the Norm of Environmental Viability

The Stockholm Declaration and the Rio Declaration recognize the principle of environmental protection. Principle 1 of the Stockholm Convention holds that a "[m]an has the fundamental right to . . . adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."[58] The Rio Declaration was also an effort to reflect growing international consensus of the importance of environmental protection and espoused the need for state involvement in achieving sustainable development.[59] Although these declarations are non-binding law, they may establish a growing opinio juris towards environmental protection, which, if coupled with widespread state practice of environmental protection, can lead to the development of a new customary international norm. For now, these declarations simply establish growing principles of environmental protection and state obligation that can be later incorporated into treaties.

Conventions on international humanitarian law lead to the development of historical norms which recognize the fundamental nature of environmental protection.[60] Protocol I of the Geneva Conventions bans "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."[61] A similar provision is mirrored in the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which prohibits each state from engaging in such techniques "having widespread, long-last-

57. Lynn Berat, *Defending the Right to a Healthy Environment: Toward a Crime of Genocide in International Law*, 11 B.U. INT'L L.J. 327, 338 (1993).

58. *Stockholm Declaration*, *supra* note 20, at 4.

59. *See* United Nations Conference on Environment and Development, June 3–14, 1992, *Rio Declaration on Environment and Development*, ¶ 7, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992).

60. HUNTER ET AL., *supra* note 1, at 316.

61. Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 35(3), Dec. 12, 1977, 1125 U.N.T.S. 3.

ing or severe effects as the means of destruction, damage or injury to any other State Party."[62] In addition, the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects prohibits incendiary attacks on forests and plant cover unless the forest is part of a military objective or the military requires use of natural elements to cover, conceal, or camouflage combatants.[63]

2. National Recognition of the Right to a Healthy Environment

Referring back to the criteria proposed by the International Court of Justice in developing custom, national legislation and constitutions also evidence universal consensus in environmental rights.[64] The Angolan constitution holds that "[a]ll citizens shall have the right to live in a healthy and unpolluted environment,"[65] and the Argentina constitution holds that "[a]ll residents enjoy the right to a healthy, balanced environment which is fit for human development . . . ."[66] Brazil's constitution holds that "[e]veryone has the right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy life,"[67] whereas Turkey and Portugal have similar provisions for environmental health.[68] South Africa more poignantly established that "[e]veryone has the right to an environment that is not harmful to their health or well-being."[69] In *Juan Antonio Oposa v. Factoran*, the Philippine Supreme Court held that the right to a healthy environment is a basic human right and lawmakers need not write in the constitution and the fact that it is codified underscores its importance and requirement of state compliance.[70]

62. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, art. 1.1, Dec. 19, 1976, 31 U.S.T. 333, 1108 U.N.T.S. 152.

63. *See* Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, art. 2(4), Oct. 10, 1980, 1342 U.N.T.S. 137.

64. HUNTER ET AL., *supra* note 1, at 315.

65. ANGOLAN CONSTITUTION [ANGL.] art. 24(1).

66. CONSTITUCIÓN ARGENTINA [CONST. ARG.] [Constitution] art. 41.

67. CONSTITUICÃO FEDERAL [C.F.] [Constitution] art. 225 (Braz.).

68. CONSTITUTION OF TURKEY [TURK.] art. 56 provides: "[E]veryone has the right to live in a healthy, balanced environment." *Id.* CONSTITUTION OF THE PORTUGUESE REPUBLIC art. 66 provides: "[E]veryone has the right to a healthy and ecologically balanced human environment and the duty to defend it." *Id.*

69. S. AFR. CONST. 1996 cl. 24(a).

70. *Id.*

3. Regional Recognition of the Link Between Human Rights and the Environment

Regional human rights treaties also recognize the right to a healthy environment. The first regional instrument to do so was the African Charter on Human and Peoples' Rights, which recognized the right of all people to a "satisfactory environment favorable to their development."[71] The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights, created by the Organization of American States, initiated a right to a healthy environment through the following provision: "(1) [e]veryone shall have the right to live in a healthy environment and to have access to basic public services[; and] (2) The State Parties shall promote the protection, preservation and improvement of the environment."[72] The protocol also includes state action guidelines, such as requiring states to cooperate on an international level and adopt all necessary measures to protect environmental rights, depending on the available resources and degree of development of the state.[73] Moreover, the Organization of Economic Cooperation and Development ("OECD") propounded that the right to a healthy environment is a fundamental human right.

Furthermore, regional human rights bodies have successfully filed suit for inadequate environmental conditions.[74] Although there is no explicit right to a healthy environment in the European Convention on Human Rights, the European Court recognizes environmental rights under other rights made explicit by the convention, namely the rights to life and property.[75] Besides *Lopez Ostra v. Spain,* the European Court of Human Rights has presided over numerous human rights cases involving environmental harm.[76] For example, in *Guerra v. Italy,* the European Court held that Italy violated the applicants' right to privacy and family life under Article 8 of the European Convention

71. African Charter on Human and Peoples' Rights art. 24, June 27, 1981, 21 I.L.M. 58.

72. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights "Protocol of San Salvador," art. 11, Nov. 17, 1988, O.A.S.T.S. No. 69, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 79 (San Jose, Costa Rica, Secretariat of the Inter-American Court of Human Rights 2003), *available at* http://www.oas.org/juridico/English/treaties/a-52.html.

73. *Id.* art. 1.

74. Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights,* 24 STAN. ENVTL. L.J. 71, 109 (2005).

75. Jennifer Cassel, *Enforcing Environmental Human Rights: Selected Strategies of US NGOs,* 6 NW. U. J. INT'L HUM. RTS. 104, 106, 123, 126 (2007).

76. *Id.*

on Human Rights, when Italy failed to protect applicants from the severe environmental pollution imposed upon the town of Manfredonia by the Enichem Agricoltura factory.[77] The court found that the toxic emissions affected the individuals' well-being and prevented them from enjoying their Manfredonia homes, thereby affecting their private and family lives.[78]

Similarly, the African Commission of Human and Peoples' Rights in *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*—relying upon, inter alia, Article 24 of the African Charter on Human and Peoples' Rights—found Nigeria in violation of the right to a satisfactory environment by permitting Shell Corporation to disregard the health and environment of communities when exploiting oil in Ogoniland.[79] The Commission held that the Nigerian government condoned the violation of international environmental standards by (1) providing military support to oil companies; (2) failing to provide environmental impact studies; and (3) refusing independent assessment of environmental harm.[80] Although the Commission only made non-binding recommendations, the newly enacted African Court on Human and Peoples' Rights is authorized to give advisory opinions, order payment of compensation, and can hear cases brought directly by individuals.[81]

In *Maya Indigenous Communities of the Toledo District v. Belize,* the Inter-American Court of Human Rights found that Belize violated the rights of Mayan communities when it permitted the exploitation of natural resources within Mayan lands without the community's informed consent, and permitted logging and oil drilling that caused irreversible environmental harm to the land relied upon for subsistence by the Mayan communities.[82] Recognizing the state's concerns for economic growth, the Commission held that

> development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particu-

77. Guerra v. Italy, 26 Eur. Ct. H.R. 211, 228 (1998).

78. *Id.*

79. *See* Justice C. Nwobike, *The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights Under the African Charter:* Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria, 1 AFR. J. LEGAL STUD. 129, 137–38 (2005).

80. *See id.*

81. HUNTER ET AL., supra note 1, at 1406.

82. Maya Indigenous Cmtys. of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OE/Ser.L/V/II.122, doc. 5 rev. 1 ¶ 153 (2004), *available at* http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm.

> larly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.[83]

The court thereby indicated its recognition of the connection between human rights and the environment.

F. Arenas for Enforcement of Human Rights Claims

Presently, there are several mechanisms available for individuals to bring forth claims of environmental harm. Among these are the Commission for Environmental Cooperation, created by the North American Agreement on Environmental Cooperation and the World Bank Inspection Panel, which has authority to review violations of the Convention on Access to Environmental Information, Public Participation in Decision Making and Access to Justice in Environmental Matters.[84] However, these bodies provide "little recourse [for] individual victims of environmental harm" and it is quite often the case that domestic laws are inadequate means of redress.[85] Because environmental rights are so intertwined with human rights, it is necessary to provide individual access to established human rights enforcement mechanisms for victims to seek environmental harm remedies.

A variety of international and regional bodies monitor and enforce human rights by providing a forum in which individuals can raise claims of human rights violations. Each of the human rights treaties has a specific committee to implement the rights entailed in that specific covenant. The United Nations Human Rights Committee facilitates the ICCPR, whereas the Committee on Economic, Social and Cultural Rights executes the ICESC.[86] The Committee on the Elimination of Racial Discrimination and the Committee on the Rights of the Child also share this function of enforcing their respective treaties.[87] More generally, the Economic and Social Council has the authority to make recommendations for the promotion and protection of human rights. It created the United Nations Human Rights Council (origi-

83. *Id.* ¶ 194.

84. Caroline Dommen, *Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms,* 11 GEO. INT'L ENVTL. L. REV. 1, 42 (1998).

85. Randall S. Abate, *Climate Change, the United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights,* 43A STAN. J. INT'L L. 3, 20 (2007).

86. HUNTER ET AL., *supra* note 1, at 1394.

87. *Id.* at 1395.

nally the United Nations Commission on Human Rights)[88] as a subsidiary intended to meet this objective.[89]

Treaty bodies monitor human rights compliance through submitted state reports.[90] In return, the committee created to implement the rights will examine the report and submit an opinion on the state's compliance as well as recommendations to the state.[91] States may submit complaints alleging non-compliance of another state to the appropriate treaty body for review.[92] Individual complaints on human rights violations can only be heard by the Human Rights Committee (overseeing the ICCPR), the Committee Against Torture (overseeing the Convention Against Torture), and the Committee on the Elimination of Racial Discrimination ("CERD") which oversees the Convention on the Elimination of Racial Discrimination.[93] In reviewing allegations of human rights violations, the committees adopt General Comments which provide an authoritative interpretation of the general obligation and rights in question and "are intended to indicate to states how they can promote implementation of human rights norms" and also can "serve to give substance and clarity to issues that are not specifically covered by, but which arise in the context of, the human rights treaties."[94] The treaty bodies may also request fact-finding missions to determine whether or not a state is acting in violation of the treaty and can require injunctive measures to prevent irreparable damages while investigating a human rights claim.[95]

Through the Human Rights Committee and the CERD, individuals and NGOs within a jurisdiction of a state which is a party to the respective treaty can submit complaints and seek redress for human rights violations when their rights have been affected.[96] Although no party has submitted an environmental case to the CERD as yet, the treaty body is ripe for issues of environmental harm and can potentially provide injunctive relief as well as redress to individuals and

88. The United Nations General Assembly voted to replace the United Nations Commission on Human Rights with the United Nations Human Rights Council in March 2006. *See* G.A. Res 60/251, U.N. Doc. A/RES/60/251 (Mar. 15, 2006), *available at* http://www.un.org/depts/dhl/resguide/r60.htm.

89. HUNTER ET AL., *supra* note 1, at 1394.

90. *See* Dommen, *supra* note 84, at 22.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 8.

95. *Id.* at 8–9.

96. *Id.* at 22–23.

groups suffering from environmental discrimination.[97] Nevertheless, individuals and groups claiming environmental harm that amounts to an infringement of their right to self determination, life, health, privacy, or cultural expression can still bring claims against the state before the Human Rights Committee.[98]

Environmental claims before the Human Rights Committee usually fall under practices affecting the self determination and cultural expression of indigenous groups and environmental harm resulting from nuclear weapons and radioactive materials.[99] In *Chief Bernard Ominayak and Lubicon Lake Band v. Canada*, the Human Rights Committee found that the government concession to oil and gas exploration and the resulting environmental harm threatened the way of life and culture of the minority group and thus infringed upon their right to self determination and cultural expression under the ICCPR.[100] In addition, the Human Rights Committee has found that the environmental hazards of nuclear testing raise legitimate environmental concerns and pose a great threat to the right to life.[101]

Furthermore, individuals and NGOs can bring environmental rights before regional human rights bodies such as the European Court of Human Rights, the Inter-American Human Rights Court ("IAHR"), and the African Court on Human and Peoples' Rights. Each court has a reciprocal Commission tasked with the implementation of the correlating human rights convention.[102] In the Inter-American system, states, groups, or individuals may submit a complaint to the IAHR Commission regarding an alleged human rights violation conducted by a state party to the Organization of American States.[103] The Commission in turn investigates the allegation and can choose to

97. *Id.*

98. *Id.*

99. *Id.* at 24.

100. *See* Communication No. 167/1984, Report of the Human Rights Comm., U.N. GAOR, 45th Sess., at 27, U.N. Doc. A/45/40 (1990).

101. Dommen, *supra* note 84, at 26–27.

102. The European Convention for the Protection of Human Rights and Fundamental Freedoms created the European Court and the Commission of Human Rights, the Inter-American Human Rights Court and the Commission to implement the Charter of the American States, the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 19, Nov. 4, 1950, 213 U.N.T.S. 222.

The African Charter on Human and Peoples Rights established the African Court of Human and Peoples Rights, and tasks the African Commission on Human and Peoples' Rights with monitoring and implementing human rights within the member states. *See* African Charter on Human and Peoples' Rights, *supra* note 71, at 58.

103. Abate, *supra* note 85, at 37–38.

refer the case to the IAHR court for remedial action—e.g., compensatory damages or temporary injunction to prevent future harm—or may publish a recommendation.[104] Decisions by the IAHR court are binding on the twenty-two states that have ratified the American Convention on Human Rights.[105] However, recommendations made by the IAHR Commission are merely persuasive and not binding upon member states.[106] Therefore, claims of environmental rights violations could most efficiently be enforced through the mechanisms already set in place to hear claims of human rights violations.

G. Potential Remedies for Violations of Environmental Rights

Numerous human rights instruments have established when an individual may remedy a violated right.[107] Depending upon the human rights violation, the Human Rights Committee requires that the belligerent state investigate the facts, bring appropriate parties to justice and provide retribution to the victims.[108] Redress for environmental claims can also be ordered through general comments published by a human rights treaty body, which may include judicial remedies and appropriate measures deemed necessary by the committee to implement the appropriate human rights covenant.[109] The American Convention on Human Rights requires effective recourse be made available by each party state to victims of human rights violations.[110] The Inter-American Court interpreted the provision's obligations to include the investigation and punishment of those responsible for the violation, and to enforce remedies granted by the court.[111] Individuals within the European system may seek redress when a right is violated under Article 6 of the European Convention on Human Rights—recognizing the fundamental right to a fair trial, "including a right to a tribunal for the determination of rights and duties."[112] Claims under Article 6 may be brought by individuals if there is a dispute concerning a right recognized by the law of the state

104. *Id.*
105. *Id.* at 38 n.245.
106. *Id.* at 38.
107. Universal Declaration of Human Rights, *supra* note 28, art. 8; International Covenant on Civil and Political Rights, *supra* note 19, art. 2(3); African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58, 60, 62; *see also* SHELTON, *supra* note 4, at 8.
108. SHELTON, *supra* note 4, at 8.
109. *Id.* at 8–9.
110. American Convention on Human Rights, art. 25, Nov. 22, 1969, O.A.S.T.S. 36, 1144 U.N.T.S. 123.
111. SHELTON, *supra* note 4, at 9.
112. *Id.*

party. In *Zander v. Sweden*, the European Court of Human Rights held that a municipality's permission for dumping of toxic substances into the local water supply without providing safe drinking water in the face hazardous contamination was a violation of the applicant's rights under Article 6.[113] The court found that the applicant was entitled to protection from pollution to his water supply and that the failure to provide adequate compensation for such pollution resulted in an infringement of applicant's right to remedy.[114]

A human rights approach may add the moral imperative necessary to shift safety regulations from just an economic consideration to an ethical, international concern. As earlier discussed, a human rights approach may give the Bhopal victims access to United States courts and punitive damages, as well as access to international mechanisms for holding the Indian government liable for relaxing environmental and safety regulations for toxic manufacturing plants.

II. Case Study of Bhopal

In late 1984, when the world awoke to find thousands dead due to a massive gas leak, lawyers flocked to Bhopal in order to represent victims in the potentially lucrative tort claim.[115] It soon became apparent that the Indian system was unprepared to preside over mass tort claims and United States jurisdiction was sought.[116] When the victims' claims were dismissed by the United States courts, the lengthy litigation process in India caused widespread despair and inadequate compensation for victims.[117] Furthermore, the Indian government chose to represent the victims, evading any means of holding the government partially responsible for the environmental disaster.[118] Although the claims were settled prior to the Indian Supreme Court's determination of fault, many of the victims today are still seeking compensation for their health problems resulting from the disaster and it is unclear whether the case provided an adequate deterrent against fu-

113. Zander v. Sweden, 5 Eur. Ct. H.R. 1, 11 (1993).

114. SHELTON, *supra* note 4, at 10.

115. JAMIE CASSELS, THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL 5 (1993). This Comment does not address tort reform and the failure of a torts-based approach is discussed herein only in the interest of highlighting the lack of effective mechanisms that provide remedies for victims of environmental disasters and hold corporations liable.

116. *Id.* at 148–52.

117. Amnesty Int'l, *Clouds of Injustice: Bhopal Disaster 20 Years On* 1, AI Index 20/015/2004 (2004), *available at* http://www.amnestyusa.org/business/bhopal.pdf [hereinafter Amnesty Int'l, *Clouds of Injustice*].

118. CASSELS, *supra* note 115, at 155.

ture environmental harm.[119] A human rights approach likely would have provided an alternative forum for the victims to seek relief and expedite their claims when national law proved inadequate.

A. Background on the Disaster

On December 2,1984, a leak of toxic gas from a storage tank belonging to the Union Carbide plant spread through Bhopal, India, instantly killing thousands and injuring hundreds of thousands.[120] The residual effects of the disaster increased the mortality figures over time. In 1987, the official death toll stood at 3,500, and by 1992, the deaths of over 4,000 people were attributed to the disaster.[121] Approximately 30,000–40,000 people were seriously injured by the toxic leak, and 200,000 were deemed by the Indian authorities to be affected through minor injury, death within the family, or by social and economic displacement.[122] The Union Carbide plant had manufactured pesticides and insecticides by compounding methyl isocyanate, a chemical known to be highly volatile and toxic.[123] The toxic gas spread through the densely populated informal settlements surrounding the plant.[124] The victims of the leak were almost entirely made up of the poorest members of the population.[125]

Although the involved parties hotly contest the cause of the leak, the disaster evinced the lack of safety systems and hazardous waste containment as well as the failure of the Indian government to properly consider the risks and social costs of placing a hazardous chemical facility in a densely populated area.[126] In an attempt to attract foreign investment, the environmental and industrial safety laws of India were weak and mildly enforced.[127] Reduced safety standards in developing countries result in an unequal distribution of risks and benefits of industrialization, and quite often the environmental costs and health risks are placed upon the poor.[128] At the time of the Bhopal disaster, India had no mechanism in place for monitoring toxic substances and had almost no regulation on the storage and transportation of such

119. *Id.*
120. *Id.* at 3.
121. *Id.* at 5.
122. *Id.*
123. *Id.* at 4.
124. *Id.*
125. *Id.* at 5.
126. *Id.* at 7.
127. *Id.* at 22.
128. *Id.* at 23.

substances in spite of the fact that approximately 5,000 chemical factories were operating in India.[129] Furthermore, the incident shows a failure of the tort law system to provide an incentive to companies in reducing risk; India's lack of enforcement of such laws supplants any incentive by companies to consider the costs of industrial accidents and take steps necessary to prevent such accidents.

B. Procedural History of the Bhopal Case in the United States

Once presented in United States courts, Judge John Keenan dismissed the Bhopal case on the grounds of forum non conveniens.[130] Judge Keenan explained that securing witnesses and evidence would be too difficult and the Indian judiciary presented a viable alternative for adjudication of the claim.[131] Indian attorney Indira Jaisin observed that the dismissal decision was based on the notion that the United States did not have a strong interest in hearing the case and that the issue was not within the United States jurisdiction, even though Union Carbide is a United States multinational corporation.[132] Lawyers and activists appealed the decision and filed the case simultaneously in India. One reason for the appeal was that the amount of potential damages in the United States would be higher than in India.[133] Unlike India, there is the possibility of higher compensatory damages and punitive damages for victims in the United States. In addition, the claimants would face difficulty in collecting an award granted in India since the parent company was located in the United States.[134] Any decision by an Indian court would therefore have to be verified by a United States court.[135] Such a verification process may prolong and perhaps inhibit the receipt of damages by many victims.

After the dismissal of the case in the United States, the Indian government passed the Bhopal Gas Leak Disaster Act, which vested the right to represent victims of the disaster exclusively to the Indian government.[136] The claim was litigated as a class action tort before the

129. *Id.* at 24. The only health and safety legislation in Bhopal at the time was the Factories Act of 1948, which regulated mechanical problems and physical injuries. *Id.* It was not until after the disaster that India enacted comprehensive environmental protection legislation, the Environmental Protection Act of 1986. *Id.*

130. KIM FORTUN, ADVOCACY AFTER BHOPAL: ENVIRONMENTALISM, DISASTER, NEW GLOBAL ORDERS 25 (2001).

131. *Id.*

132. *Id.* at 26.

133. *Id.* at 27.

134. *Id.*

135. *Id.*

136. *Id.* at 26.

Indian Supreme Court, with the Indian government operating as parens patriae on behalf of the victims, and led to an eventual settlement.[137]

C. Failure of a Torts-Based Approach in Bhopal

Massive environmental disasters and toxic injuries rely on tort law to rectify associated harm and to return victims to their pre-harm position. In order to properly litigate a tort claim, the victim must establish that the defendant had a duty of care, breached that duty of care, and this breach caused the victim's injuries.[138] This system may function for an individual harm; however, massive toxic torts are far more complex, requiring scientific and technological expertise as well as data collection, which are beyond the resources of the impoverished Bhopal resident.[139] The situation is made even more complex for Bhopal because the cause of the accident still remains contested and much of the physical evidence involving the incident was destroyed during the explosion.[140] Thus, it is almost impossible for the victim to show that *but for* the actions of Union Carbide, the residents of Bhopal would not have been harmed. Furthermore, the Indian government would unlikely find Union Carbide in violation of safety regulations which could implicate India's lax environmental regulations at the time of the disaster. Thus, the responsible party under a tort based claim remains equivocal.

Tort law also attempts to provide deterrence against future harms by imposing the cost of the harm onto the defendant.[141] These costs are then internalized in the price of conducting the activity, holding industrial actors liable for damage to health and the environment, which supposedly provides an incentive to create greater safety regulations.[142] However, such deterrence assumptions are ineffective with large complex organizations such as Union Carbide.[143] Corporations do not have a single directing mind that can weigh potential risk and the cost of safety measures; instead Union Carbide is divided into nu-

137. *Id.* Parens patriae traditionally refers to the role of the state as sovereign and guardian of persons under legal disability. BLACK'S LAW DICTIONARY 1144 (8th ed. 2004). States have used the doctrine to recover damages to quasi sovereign interests such as the "health and welfare" of its people. *Id.*

138. CASSELS, *supra* note 115, at 77.

139. *Id.* at 78.

140. *Id.*

141. *Id.* at 103.

142. *Id.*

143. *Id.*

merous operating bodies each with some degree of autonomy attached.[144] In addition, the managers of these factions are partially protected from lawsuits under doctrines of separate corporate personality and limited liability which hold that individual owners and parent companies are not responsible for the debts of the subsidiary company under their control.[145] Thus, a corporate defendant like Union Carbide Corporate is protected from the actions of its affiliate company in India and "the threat of a large damage award against an undercapitalized affiliate may be deprived of all deterrent effect if the human beings who control that undertaking are confident that they will not have to pay."[146]

D. Inadequacy of Adjudication Under International Law

International law remains weak in providing redress for victims of pollution and industrial hazards. As subjects of international law, nation-states and multinational corporations are deemed to be private citizens who cannot be made accountable under international law.[147] Thus, where an industrial disaster shows no transboundary effects, it remains a domestic issue with little access for victims to bring claims against non-state actors in the international forum. Recognizing that the goals of litigating a massive environmental disaster case are compensation and remedial assistance to the victims as well as deterrence of future harms, the lack of domestic accountability for multinational corporations in developing countries evades both of these goals and therefore, some international involvement would be beneficial.

Despite the widespread effects of the 1986 Chernobyl disaster, no claims were brought against the Soviet Union for negligence, which indicates a dearth of liability in the international law for environmental disasters. Philippe Sands, a staff member of the Centre for Law and the Environment, ascribes this lack of litigation to the fact that there is no universal principle of international law requiring states to prevent such disasters.[148] Although Sands properly recognizes the inadequacy of international law to address environmental disasters, he fails to recognize that a human rights approach may satisfy the goals of compen-

144. *Id.* at 105.

145. *Id.* at 104.

146. *Id.*

147. Philippe J. Sands, *The Environment, Community and International Law*, 30 HARV. INT'L L.J. 393, 398 (1989).

148. *Id.* at 393.

sation and deterrence ascribed to the litigation of environmental pollution claims.

E. Effects of a Human Rights Approach on Litigating the Bhopal Disaster

Although the settlement with Union Carbide was achieved in 1989, the victims of the disaster have not been fully compensated and no one from Union Carbide or the Indian government was held accountable for the leak and lack of safety precautions.[149] The Indian government created a vague compensation guideline in 1992, but no infrastructure was in place to deliver the funds.[150] Victims were provided 200 rupees per month as an interim form of relief and a large portion of relief funding was diverted through corruption and administrative costs.[151] Although money for compensation was available in 1989, the claims courts did not even begin to adjudicate those cases until 1992.[152] Residents of Bhopal are still suffering from numerous health disorders related to the Union Carbide leak,[153] illustrating the inefficiency and ineffectiveness of a tort-based approach in litigating mass environmental harm.

1. Human Rights Versus Tort Law

A human rights system for environmental harm litigation that is used along with the existing body of tort law may fulfill the goal of deterrence that is otherwise not recognized by a torts approach alone. One of the main reasons that the Bhopal plaintiffs may have found the United States to be a more favorable forum for litigation was the opportunity to obtain punitive damages which are not available as a remedy in India. Judge Keenan dismissed the claims in the United States, however, finding that India had a similar legal system and was therefore a viable forum for mass tort litigation.[154] Although the substantive law for tort actions was present in India during the Bhopal crisis, India's legal system was inaccessible to a majority of the public.[155] With a ratio of 10.5 judges to one million people, courts were inundated with pending cases and only a privileged minority could

149. Amnesty Int'l, *Clouds of Injustice*, *supra* note 117, at 1.
150. *See id.* at 63–67.
151. *Id.* at 64.
152. *Id.* at 66.
153. *Id.* at 12.
154. CASSELS, *supra* note 115, at 148.
155. *Id.* at 150.

sustain the backlogged litigation process.[156] Furthermore, to initiate a suit, a plaintiff must pay heavy ad valorem charges in order to initiate a suit, once again preventing the majority of Indians, and Bhopal victims, from accessing the court.[157] On average, a tort claim in India takes almost thirteen years and damage awards were very low—approximately $1,263 United States dollars per successful plaintiff.[158] Adding that the Indian government has sovereign immunity, litigating a tort claim in India based on a negligence theory fails to satisfy the goals of compensation and deterrence.

The Indian government passed the Bhopal Act in order to solve the inequities of the Indian torts system made clear by the Bhopal case.[159] The Bhopal Act did not, however, dramatically change India's compensation regime for tort victims.[160] Instead, the system was rife with heavy bureaucracy and bribery.[161] Furthermore, Indian courts are generally understaffed, inundated, and ill experienced in handling evidence of large-scale toxic exposure to establish medical causation and negligence.[162] The extreme delay in settling the Bhopal claims was not as much a problem of law as it was a problem of effectively handling the claims. Three years after the incident, the government was still unable to create a functioning mechanism for identifying the victims and producing individual records.[163]

Moreover, the government's involvement illuminates a conflict of interest. The government's concern in attracting foreign investment may have contributed to its relaxed environmental regulations which in turn may have contributed to the negligence that led to the Bhopal Disaster. A human rights approach rather than a tort law based approach could better address the goals of compensation and deterrence by providing an alternate venue better suited for holding Union Carbide accountable, receiving adequate compensation for the victims, and in holding the government accountable in order to change their environmental regulations.

156. *Id.* at 150–51.
157. *Id.* at 151.
158. *Id.* at 152.
159. *Id.* at 153.
160. *Id.* at 158.
161. *Id.*
162. *Id.* at 159.
163. *Id.*

2. Bringing the Bhopal Case to the United States Under the Alien Tort Claims Act

Notwithstanding the dismissal of claims against Union Carbide by the United States District Court on the theory of forum non conveniens, a human rights approach to litigation may provide an alternative avenue for filing the Bhopal claim in United States courts. The Alien Tort Claims Act ("ATCA"), which was adopted in 1789, grants United States district courts jurisdiction over civil actions involving a tort committed by an alien in violation of the law of nations or a treaty of the United States.[164] In *Doe I v. Unocal*, a case brought under the ATCA, the Ninth Circuit held Unocal liable for its complicity in human rights abuses conducted by the military junta against Burmese villagers during the construction of an oil pipeline in Burma.[165] The court held that the threshold questions of an ATCA case are whether the alleged tort is a violation of the law of nations and whether the customary international norm provides liability for non-state actors who do not engage in the actions of the state.[166]

Customary norms that provide direct liability of non-state actors include genocide, piracy, and slavery.[167] However, according to the Restatement on Foreign Relations Law, state involvement can be shown if, "as a matter of state policy, it practices, encourages, or condones" conduct that violates international law.[168] With this, plaintiffs in the Bhopal case can potentially present a claim against Union Carbide under the ATCA for violations of human rights resulting from the disaster; namely for infringement of right to life and health. However, United States courts interpret international law norms very narrowly and will only permit violation of an *explicit* universal norm to be brought under the ATCA.[169] Thus, it is unlikely that a claim can be brought forth for violation of environmental safety until evidence of uniform state practice under a sense of legal obligation is established.

Nevertheless, cases for environmental harm can still be brought forth under violation of other established human rights and the victims in Bhopal can assert claims of right to life and health. Although it has signed the ICCPR, the human rights instrument establishing these

164. Alien Tort Claims Act of 1789, 28 U.S.C. § 1350 (2000).

165. *Doe I v. Unocal*, 395 F.3d 932, 962–63 (9th Cir. 2002).

166. *Id.* at 945.

167. HUNTER ET AL., *supra* note 1, at 1423.

168. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

169. HUNTER ET AL., *supra* note 1, at 1422.

rights, the United States does not view the treaty as self-executing and thus claims asserting these rights may not be ascribed as valid treaty law which can be brought forth under the ATCA.[170] However, the right to life and health are universal norms recognized as non-derogable human rights.[171] Recognizing that widespread state practice of adhering to these rights establishes these norms as customary international law and may therefore satisfy the requirements of an ATCA claim. As the ATCA is not applicable for claims against a state, the Bhopal victims would have to bring a claim against the Indian government before an international body.

3. Bringing Claims Against the Indian Government Before a United Nations Body

Victims of environmental law violations may also bring forth claims of human rights abuse before a United Nations treaty body. The acts and omissions leading to the disaster in Bhopal violated a number of human rights enshrined in the ICCPR and ICESCR, to which India is a party. Article 6 of the ICCPR holds that every human being has the inherent right to life which, according to the General Comment, entails that states adopt positive measures to protect this right.[172] By not ensuring proper safety regulations governing the storing of toxic chemicals, the Indian government failed to satisfy its obligations under Article 6 of the ICCPR.[173] The hazardous environmental conditions in Bhopal after the leak resulted in a violation of the right to health, enshrined in Article 12 of the ICESCR.[174] This Article further requires that States provide improvement to all aspects of environmental and industrial hygiene.[175] The General Comment issued by the Committee on Economic, Social and Cultural Rights clarified the right to include state obligation in "the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human

170. *Id.*

171. *Id.* at 1373–74.

172. International Covenant on Civil and Political Rights, *supra* note 19, art 6.

173. *Id.*

174. International Covenant on Economic, Social and Cultural Rights, *supra* note 25, art 12.

175. *Id.*

health."[176] The provision also prohibits state "failure to enact or enforce laws to prevent the pollution of water, air, and soil by extractive and manufacturing industries."[177] Furthermore, the inadequate compensation and rehabilitation of victims in Bhopal and failure to hold responsible parties accountable for the disaster results in a violation of Article 2 of the ICCPR: the right to remedy. Finally, the Indian Supreme Court has recognized the right to a healthy environment as a rule of customary international law and therefore the inadequate safety precautions and environmental harm violate this right.[178]

Victims can direct claims of human rights violations to the appropriate treaty body tasked with monitoring that right. For violations of the right to life and remedy under Articles 6 and 2 of the ICCPR respectively, the Bhopal victims can address their claims to the Human Rights Committee which has previously found government concession to oil exploration resulting in harm to the indigenous community to be a violation of the right to self determination under Article 6 of the ICCPR.[179] Although individuals cannot submit violation of their rights under the ICESCR to the Committee on Economic, Social and Cultural rights, the treaty monitoring body of the ICESCR, they may make their cause known to another sympathetic state to file a claim on their behalf. In turn, these bodies can order investigations of the alleged violations and publish recommendations to the states if a human rights violation is recognized. This will bring the actions of the Indian government to the attention of the international community. Although the recommendations of the monitoring bodies are nonbinding, they can provide sufficient awareness and embarrassment to the Indian government to raise environmental regulations that protect the rights of their citizens.

Conclusion

In spite of the failure of foreign intervention, the Indian government strengthened its environmental policy towards toxic chemical plants after the disaster in Bhopal. However, a number of other developing countries, such as Nigeria and its relaxed environmental regulations towards Chevron's oil exploration, have failed to meet the

176. Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, ¶ 15, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), *available at* www.tbtv.org/pdf/GeneralCommentNo.14.pdf.

177. *Id.* ¶ 51.

178. *See* Amnesty Int'l, *Clouds of Injustice*, *supra* note 117, at 33.

179. *See* Dommen, *supra* note 84, at 24.

environmental standards necessary for maintaining the health of its citizens. By recognizing that such policies violate specific human rights, governments may be pressured into raising environmental standards and protecting the public from anthropogenic environmental disasters. Furthermore, the recognition of environmental human rights can provide a means for holding multinational corporations liable for environmental harm and promote increased safety regulations amongst potentially harmful industrial plants. A human rights approach can thus ensure that people around the world actually live in a healthy environment.